Supreme Court, U.S.
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No. 93-278

In The

Supreme Court of the United States

October Term 1993

JIMMY G. MOORE,

Petitioner,

v.

ELI LILLY AND COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the District Court and Fifth Circuit Court of Appeals correctly find that there is no evidence in the summary judgment record upon which a reasonable finding could be made that Eli Lilly and Company's stated reason for terminating Mr. Moore's employment is a pretext for discrimination on account of age?

2. Can a litigant raise by Petition for Writ of Certiorari a legal issue not presented to the lower courts?

LIST OF PARTIES

Jimmy G. Moore

Eli Lilly and Company

Subsidiaries (non-wholly owned)
DowElanco

OBJECTION TO PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari exceeds the page limits set by Supreme Court Rule 22.2 by 14 pages. To the best of Respondents' knowledge, Petitioner did not get leave of Court to deviate from Rule 22.2. Respondent objects to inclusion of pages 31-45 of the Petition for Writ of Certiorari in the record.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Eli Lilly and Company, Respondent, submits this Brief in Opposition to the Petition for Writ of Certiorari to United States Court of Appeals for the Fifth Circuit filed by Petitioner, Jimmy G. Moore

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 990 F.2d 812 (5th Cir. 1993), and the opinion of the District Court is reported at 802 F. Supp. 1468 (N.D. Tex. 1992). They are reproduced at pages A-1 and A-30,

respectively, of the Appendix attached to Moore's Petition for Writ of Certiorari. The per curiam opinion denying Mr. Moore's Petition for Rehearing and Suggestion for Rehearing En Banc is published at 993 F.2d 1545 (5th Cir. 1993).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on April 30, 1993, and Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc was denied by per curiam Order dated May 25, 1993. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(i).

STATUTORY PROVISIONS

The statute at issue in this case is the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623, which provides in relevant part:

> It shall be unlawful for an employer – (i) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

and § 631, which states:

> The prohibition in this chapter shall be limited to individuals who are at least 40 years of age.

STATEMENT OF THE CASE

Petitioner Jimmy G. Moore was discharged from his job as a pharmaceutical sales representative at Eli Lilly and Company effective December 31, 1990. He filed suit on August 25, 1991 claiming that he was discharged because of his age, in violation of section 4 of the Age Discrimination in Employment Act of 1974, 29 U.S.C. §§ 621-634. Lilly denied that age was the reason Moore was terminated. Instead, as Lilly has maintained all along, Moore was let go because Lilly believed he had falsified records used to monitor the distribution of pharmaceutical samples.

A. Proceeding Below.

After a period of approximately 10 months in which discovery was conducted, Lilly filed its Motion for Summary Judgment on June 5, 1992. Moore responded to Lilly's motion on June 25, 1992. On September 3, 1992 the United States District Court entered its Memorandum Order carefully analyzing the facts presented and granting Lilly's Motion for Summary Judgment.

Moore entered a timely notice of appeal, and filed his brief with the Fifth Circuit on November 10, 1992. Lilly filed its brief on December 24, 1992, followed by Appellant's Reply Brief filed January 6, 1993.

The Fifth Circuit scheduled oral argument in this case and counsel for Moore and counsel for Lilly appeared before Circuit Judges Irving L. Goldberg, William L. Garwood, and Jacques L. Weiner on April 30, 1993. That same day, following oral argument, the panel unanimously

affirmed the order and judgment entered by the District Court. 990 F.2d 812 (5th Cir. 1993). On the record before it, the Fifth Circuit held that there was no credible evidence whatsoever raising a genuine issue of fact concerning Lilly's stated reason for Moore's discharge. *Id.* at 819.

Mr. Moore petitioned the Fifth Circuit for rehearing and filed a Suggestion for Rehearing En Banc. No judge of the Fifth Circuit requested a poll be taken, however, and the Petition for Rehearing and Suggestion for Rehearing En Banc was denied per curiam on May 25, 1993. 993 F.2d 1545.

B. Statement of Facts.

The facts of this case are set out succinctly and accurately in the Fifth Circuit's opinion. 990 F.2d at 813-14. By stark contrast, the prolonged statement of facts on pages 9-21 of the Petition for Writ of Certiorari contains numerous statements that are immaterial, that distort the record, or that were addressed by the lower courts with reasoned explanations about why Moore's assertions would not affect the outcome of the case. None of the findings of fact in the courts' opinions are controverted by specific evidence in the summary judgment record.[1]

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[1] Mr. Moore erroneously argues that both the Fifth Circuit and the District Court deviated from the evidence by finding that Lilly's pharmaceutical representatives may be discharged for sample accountability discrepancies. Mr. Moore argues that the only consequence is placement of the "daily log." (Petition, page 17). This argument is without evidentiary support and confuses simple discrepancies with discrepancies accompanied by a suspicion of falsification. As the District Court found, Lilly

Several pages of Moore's Petition contain a near verbatim rendition from his briefs below proclaiming his innocence on the charge of records falsification. Moore's assertions, however, are based on selective and incomplete references to uncontroverted facts in the summary judgment record and, even then, his protests do not contradict the unassailable fact that Lilly had objective reasons to suspect him of falsifying sample accountability records. Simply put, the facts are uncontroverted that (1) Moore filed a false report attesting that he had distributed samples which, as it turned out, he never had in his possession, (2) once informed of the discrepancy, he sent a letter requesting that his records be altered to reflect "what really happened," and (3) when it was later discovered that the distribution set forth in his letter was impossible, he tried to retrieve the falsified report. Lilly, of course, refused and discharged Moore for falsifying company records.

The summary judgment record, as posited by both lower courts, leaves no room for debate on the fact that pharmaceutical representatives are responsible for keeping track of the drug samples they receive and distribute to physicians. Lilly's salespersons are also responsible for accounting for their samples at the end of each quarter. Because of his tracking and accounting responsibilities, it is uncontroverted that Moore was required to be attentive to the packing slips and to the contents of the boxes he

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during the two (2) years prior to Moore's termination had discharged five (5) pharmaceutical representatives under the age of 40 for records falsification.

received from the Shipping Department. Moore, therefore, was necessarily aware he never received the samples that he later claimed in his letter he had distributed.

Uncontroverted evidence confirms that it was *Moore's* dereliction in failing to keep accurate records of where, when, and to whom he was distributing pharmaceutical samples that led to his filing and attempted retreival of a false explanation for the sampling discrepancies. The suspicion was heightened further by his false representations that his second quarter discrepancy was the consequence of mistakenly marking his call cards[2] "Axid 150" instead of "Axid 300",[3] even though he made no effort to verify the truth of these representations.[4] Moore's asserted "facts" miss the point in an ADEA case and merely serve to reinforce Lilly's substantial grounds for believing that he was trying to cover up the false report concerning pharmaceutical distribution.

Respondent presents this concise recount of the facts, choosing not to burden the Court further by repeating all the material, uncontroverted facts contained in the summary judgment record. The pertinent facts as recounted above as well as those in the lower courts' decisions are

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[2] A call card, sent to Lilly each day by its salespersons, reports the day's distributions of drug samples. If the daily reports differ from quarterly inventories of the salesperson's samples, the discrepancy – if unreconciled – can result in the salesperson's termination.

[3] Axid is a drug that slows the stomach's production of acid and is commonly prescribed for patients suffering from chronic indigestion and ulcers.

[4] Again, such a "mistake" was impossible.

clearly sufficient. In short, the record does support the lower courts' decisions. However, if it will assist the Court, Respondent promptly will provide a printed supplement containing the complete list of facts along with supporting affidavits, deposition excerpts, and other exhibits.

REASONS FOR DENYING THE WRIT

This case should not be heard. No "special and important reasons" exist for exercising the Court's discretion to review the Fifth Circuit's lucid decision. Sup. Ct. R. 10-1, 28 U.S.C.A. (West Supp. 1993). The courts below fully considered the evidence in the summary judgment record and correctly decided that a jury could not reasonably have found that Lilly contrived its reason for firing Mr. Moore. Mr. Moore's Petition is merely a desperate appeal from an outcome he did not like. The decision below raises no conflict among the courts of appeals, and the Petition does not raise important issues of federal law or public policy warranting this Court's plenary attention.

I. THIS CASE DOES NOT RAISE A RIPE ISSUE CONCERNING INTERPRETATION OF THE COURT'S RECENT DECISION IN *ST. MARY'S HONOR CENTER V. HICKS*, AND CIRCUITS HAVE YET TO APPLY IT.

Moore's first reason for petitioning the Court is to "clarify the application" of *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

(Petition, page 3). The Fifth Circuit's decision affirming summary judgment against Mr. Moore, however, was issued on April 30, 1993, almost two months *before* the Supreme Court's decision in *Hicks*. *Moore v. Eli Lilly & Company*, 990 F.2d 812 (5th Cir. 1993). The denial of Moore's Petition for Rehearing occurred on May 25, 1993, thus pre-dating *Hicks* by a full month. Plainly, *Moore* may never be cited as authority for a particular interpretation of the Supreme Court's later holding in *Hicks*.

This Court should decline Petitioner's artful invitation to refine its already clear holding in *Hicks*. Should the Court determine that further guidance is someday needed, a far better vehicle would be a case where the appellate court's opinion had actually construed the *Hicks* decision.

Importantly though, no court of appeals has yet issued a published opinion applying Hicks. Consequently, a "principal purpose" for exercising the Supreme Court's certiorari jurisdiction – "to resolve conflicts among the Circuit Courts of Appeals" – does not exist. *See Braxton v. United States*, ___ U.S. ___, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991).

II. THE HOLDING OF *HICKS* NEEDS NO CLARIFICATION.

In any event, the holding in *Hicks* is abundantly clear that Title VII plaintiffs are not entitled to judgment as a matter of law if they prove that the defendant's articulated reason for an employment practice is untrue. 113 S.Ct. at 2749. Any confusion on that point was eliminated

by this Court in *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). *Hicks* re-emphasized the point, and there is no need for further clarification. Indeed, far from eliminating confusion, a grant of certiorari in this case would actually engender uncertainty that presently does not exist.

Moore's argument about the Court's intent focuses on a passage that is dictum to the actual decision in *Hicks*, and the inference Petitioner manufactures and draws from the passage distorts the Court's actual holding. That passage reads as follows:

> The fact finder's disbelief of the reasons put forward by the Defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.

Id.

This passage is dictum because it does not bear directly on the precise issue then before the Court: whether plaintiffs automatically win by proving the falsity of an employer's asserted reasons for its actions. Regardless of its status as dictum or precedent, the passage does not support Moore's strained conclusion that a genuine issue for trial under the ADEA exists whenever the plaintiff establishes a prima facie case and then counters the employer's stated reason for discharge with non-credible assertions. The quoted passage merely says that, in limited cases, and particularly, where there has been a showing of deceptions, not simply incorrectness, plaintiff's evidence of pretext may combine with his prima

facie elements to permit the factfinder to infer intentional discrimination. While this may be enough to support a pro-plaintiff judgment, there must necessarily be a finding of discrimination. Even before reaching *that* point, however, it is critical that the trial court first determine whether an issue of fact remains open. Two federal courts below have agreed that, on the evidence presented, none did.

It is axiomatic that even plaintiffs who manage to discredit their employers' explanations – a threshold burden that Moore has utterly failed to satisfy – retain the ultimate burden of proving that the adverse action was prompted by impermissible motives. E.g., *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981). See also, Fed. R. Evid. 301. Moore's attempt to manufacture confusion regarding the scope of the Court's holding in *Hicks* by cleaving to the passage quoted above was blunted effectively by the *Hicks* majority:

> [T]here is nothing whatever inconsistent between this statement [that rejection of defendants' reasons permits the inference of discrimination] with our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," *infra*, at 2752, and (2) "it is not enough . . . to *dis*believe the employer," infra, at 2754. Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*

113 S.Ct. at 2749 n.4 (emphases in original).

As of June 25 of this year, Moore's contentions lacked the majority support of this Court. Aside from a change of one member of the Court, nothing else has changed over the past four months. Certainly, stare decisis cautions against an abrupt change in course when the precedent at issue has yet to produce any published opinions construing the decision, much less evincing confusion.

III. THE LOWER COURT'S DECISIONS ARE CONSISTENT WITH THE HOLDING AND DICTA OF *HICKS*.

On appeal to the Fifth Circuit, Moore argued that the District Court applied an erroneous and unprecedented "pretext plus" standard in evaluating the evidence. The Fifth Circuit flatly rejected that argument. 990 F.2d at 817. Moore lost in the lower courts because he failed to produce valid evidence to support a finding that Lilly's stated reason for discharging him was "unworthy of credence" (A-13, 14) or that a sufficient nexus existed between his termination and his age.

Moore now is attributing to the Fifth Circuit the same "pretext plus" holding that he said the District Court made. (Petition, page 33). Again, he is mistaken. All the Fifth Circuit held was that "Moore, like so many other ADEA claimants before him, has failed to produce summary judgment evidence capable of showing the existence of a genuine issue of material fact on the pretext issue." 990 F.2d at 819.

Petitioner's response to the considerable, uncontroverted evidence supporting Lilly's conclusion that Moore had given false information and then tried to

cover it up was in fact no response at all: Moore produced absolutely no evidence that Lilly knowingly made up a reason for his termination. The Fifth Circuit noted as much:

> Moore's problem is his total failure to produce any evidence of pretext, either in connection with establishing his prima facie case or subsequently in response to Lilly's demonstration of a non-discriminatory reason for its action. He protests that the district court imposed on him a new "pretext burden"[.] Not so. The district court was merely requiring Moore to do what all of the relevant case law demands that he do: produce some evidence of pretext. [footnote omitted].

Id. at 817.

The 14 pages he spends arguing that he is innocent of records falsification, (Petition, pages 8-21) utterly fail to address the salient issue, whether Lilly acted on the basis of age and made up a reason for a discharge it knew to be untrue. This point was emphasized by the Fifth Circuit:

> The fact that the employer's reasonable belief eventually proves to have been incorrect – if, for example, Moore were eventually to be vindicated from the charges of falsifying records – would not change the conclusion that the firing had been non-discriminatory. To survive summary judgment, therefore, Moore had the burden of producing some evidence that Lilly's proffered explanation is mere pretext.

990 F.2d at 816.

Moore's unspoken premise is that pretextuality is synonymous with unreasonableness. As pointed out by

the District Court and by the Fifth Circuit, however, Moore's theory would radically transform the ADEA into a general wrongful discharge law benefiting people 40 years of age and older and 990 F.2d at 816, 819. That is so because an inference of illegality would be permitted from nothing more than a finding that the employer's stated reason for discharge is unreasonable. In other-words, in ADEA discharge cases there would have to be trial any time the plaintiff (1) submitted an affidavit denying that he committed the offense for which he was discharged or (2) presented evidence that the employer did not exercise reasonable business judgment. To make any sense at all, the pretextuality phase of the burden-allocation scheme must require evidence that the articulated reason is contrived to mask discrimination, not merely mistaken. This is wholly consistent with the holding in *Hicks* and is fully recognized by the Fifth Circuit's opinion.

IV. THE COMMENTS ATTRIBUTED BY PETITIONER TO MR. YELVERTON DO NOT RAISE A GENUINE ISSUE OF MATERIAL FACT.

Petitioner improperly advocates his bizarre notion that a sinister and unlawful intent can be inferred as a matter of law whenever workplace conversations involve general inquiries about retirement plans or everyday musings about life after work. (Petition, pages 36-41). As he would have it, an incoming manager would not be allowed to make the practical inquiry of whether an employee with 30 years experience and who is about to qualify for the company's maximum retirement benefit is going to do what many other people in that position

choose to do – retire. As Petitioner would have it, supervisors would never be permitted to ask employees about their dreams, expectations, and plans upon earning the opportunity to retire with a good pension. Supervisors who engage in such common sense and everyday discussions should, in Moore's view, be brought before a jury and, along with their employer, exposed to liability for damages.

The District Court and a panel of the Fifth Circuit were presented with Petitioner's evidence of "age related remarks" and were uniformly unimpressed, Judge Weiner put it this way in the Fifth Circuit's decision:

> These questions, however, cannot be said to represent, as Moore asserts, a discriminatory intent by Yelverton. Without more, they merely demonstrate a new supervisor's reasonable inquiries about the ages of the members of his work force and their known plans for the future – facts on which to gauge the anticipated longevity of his crew. [footnote omitted]

990 F.2d at 818.

Contrary to Petitioner's characterization, the lower courts did not choose between a lawful and unlawful meaning of comments that reasonably could be viewed as biased. Instead, the courts below simply found that the stray innocuous comments described by Moore, with nothing more, could not possibly evince discriminatory intent. A different ruling by the Fifth Circuit would have spelled gerontological censorship for employers in Mississippi, Louisiana, and Texas.

In short, summary judgment for Lilly was sustained because Moore's response to the Motion was flawed in at least two respects. First, he presented no evidence refuting Lilly's proffered explanation that it believed he had falsified sample accountability records. Second, even if the accuracy of Lilly's age-neutral reason was questionable, Moore produced nothing to suggest that the reason given for his discharge was made up to camouflage discrimination.

Once Lilly met its burden of production, the presumption of discrimination raised by Moore's assumed prima facie case *disappeared*, requiring Moore then to prove that Lilly's actions were motivated by unlawful discrimination. The mandatory presumption accompanying a prima facie case cannot be resurrected at a later day. *Hicks*, 133 S.Ct. at 2749. All Moore could muster in opposition to Lilly's Motion for Summary Judgment was an argument that Lilly was mistaken in its belief that Moore was falsifying records and Yelverton's innocent, stray remarks, which no reasonable factfinder could view as evincing discriminatory intent. As this Court has noted, an issue is not genuine when there is nothing more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). In sum, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Id.* at 587, 106 S.Ct at 1356. Although in the context of a summary judgment proceeding, Moore need only *raise* a genuine issue of fact regarding pretext (rather than prove it), his speculations and subjective beliefs that his discharge was based on age

is, standing alone, simply insufficient to establish a valid ADEA claim. Bald assertions do not suffice.

CONCLUSION

As the Fifth Circuit bluntly (yet accurately) noted, Petitioner's misapprehensions of the burden shifting process "demonstrates Moore's failure to grasp fundamental principles of this area of law." 990 F.2d at 816. The same may be said of his Petition before this Court. Simply put, Moore's case has always suffered a fatal flaw: the absence of a genuine issue of fact that Lilly's asserted reason for Moore's discharge was a pretext for age discrimination. Were a jury to hear Moore's "evidence" of pretext, the possibility of their drawing a contrary inference is, viewed generously, remote. While there is no bright line demarcating when a "genuine issue of fact" degenerates into merely an "attenuated possibility" that a jury might infer a discriminatory motive, as the late Judge John Brown wrote of another ADEA appeal, "the facts of this case are outside even the fuzzy shadows." *Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d 805, 814 (5th Cir. 1991).

The Petition for Writ of Certiorari should be dismissed.

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